

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOMER CONEY AND LAUREEN CONEY : CIVIL ACTION

v. :

PEPSI COLA BOTTLING COMPANY : NO. 97-2419
AND BRETT FRANKENBERG

Ludwig, S.J.

May 28, 1997

MEMORANDUM

This memorandum accompanies an order entered this date granting defendants Pepsi Cola Bottling Company and Brett Frankenberg's motion to dismiss the state claims of intentional and negligent infliction of emotional distress, negligent supervision, and loss of consortium. Fed. R. Civ. P. 12(b)(6).¹ The order dismisses the PHRA claim, 43 Pa. Stat. Ann. § 955(a), against defendant Frankenberg without prejudice to the filing of an amended claim by June 16, 1997 consistent with this memorandum and with Fed. R. Civ. P. 11.

1. Intentional and Negligent Infliction of Emotional Distress vs. Defendant Pepsi: Effect of Pennsylvania's Worker's Compensation Act

These claims are excluded by the Pennsylvania Worker's Compensation Act, 77 Pa. Stat. Ann. § 481(a) (West 1992 & Supp.

1. In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the allegations in the complaint are accepted as true as are all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Only the facts alleged in the complaint and its attachments will be considered, without reference to other parts of the record. Id. This motion was submitted and has been decided solely on the allegations set forth in plaintiffs' Amended Complaint II.

1996).² There is one exception for personally motivated intentional conduct of third persons or co-workers that is unrelated to plaintiff's status as an employee.³ Hoy v. Angelone, __ Pa. Super. __, __ 691 A.2d 476, 482 (1997); Price v. Philadelphia Elec. Co., 790 F. Supp. 97, 100 (E.D. Pa. 1992) (racially discriminatory conduct that included threatening to "wipe out" plaintiff was within exception because actions were directed specifically at plaintiff, not entire race). Here, the necessary constituents of the personal animus exception have not been pleaded.⁴ Instead, the pertinent allegations depict employment-related discriminatory conduct by defendant Frankenberg based on racial bias.⁵

2. 77 Pa. Stat. Ann. § 481(a): "The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees "

3. 77 Pa. Stat. Ann. §411(1):

[T]he term 'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him as an employee or because of his employment

4. Allegedly defendant Frankenberg stated, "you all aren't happy unless you're working up a sweat" and "you all are built for bulk." Amended Compl. II ¶ 19. Also alleged is that because of his race plaintiff was demoted and treated uncivilly. Id. ¶¶ 20-21, 24-27.

5. In similar cases in which the offending conduct was premised on generalized racial bias, the personal animosity exception has not been applied: Richardson v. Arco Chemical Co., Civ.A. 95-6185, 1996 WL 482911, at *4 (E.D. Pa. Aug. 26, 1996) (WCA excluded claim for intentional infliction of emotional distress premised on racial and sexual discrimination because not motivated by personal animosity); Dugan, 876 F. Supp. at 724 (WCA
(continued...))

2. Negligent and Intentional Infliction of Emotional Distress vs. Defendant Frankenberg: Effect of Pennsylvania's Worker's Compensation Act

The WCA expressly excludes negligent conduct by a co-worker, albeit not intentional conduct. 77 Pa. Stat. Ann. § 72 (West 1992 & Supp. 1996) ("[A fellow employee] shall not be liable to anyone at common law or otherwise . . . for any act or omission occurring . . . except for intentional wrong.").

Intentional infliction of emotional distress demands "extreme and outrageous conduct intentionally or recklessly caus[ing] severe emotional distress." Restatement (Second) of Torts § 46(1) (1965). In legal theory, this is an imprecise and controversial tort;⁶ and it has been said that the requisite conduct has rarely been found in the employment context and then almost entirely in the area of sexual harassment. Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988); Hoy, ___ Pa. Super. ___, 691 A.2d at 483. Although the alleged statements and discriminatory conduct are unquestionably reprehensible, the cases in our district have consistently held that highly provocative racial slurs and other discriminatory incidents do not amount to

5. (...continued)
excluded intentional and negligent infliction of emotional distress claims for harassment arising out of employment relationship); Shaffer v. Procter & Gamble, 412 Pa. Super. 630, 635, 604 A.2d 289, 292 (1992) (WCA excluded claim for malicious treatment because not personal).

6. Bolden v. S.E. Pennsylvania Transp. Auth., 820 F. Supp. 949, 953 (E.D. Pa. 1993), aff'd, 21 F.3d 29 (3d Cir. 1994).

actionable outrageous conduct.⁷ See, e.g., Richardson, 1996 WL 482911, at *4 (allegations of discriminatory treatment and derogatory racial and sexual remarks insufficient to state intentional infliction of emotional distress claim); Parker v. DPCE Inc., Civ.A. 91-4829, 1992 WL 501273, at *1 (E.D. Pa. Nov. 3, 1992) (racial harassment and termination did not rise to necessary level of outrageousness); Aiken v. Buck Ass'n for Retarded Citizens, Inc., Civ.A. 91-2672, 1991 WL 243537, at *7 (E.D. Pa. Nov. 15, 1991) (same); James v. International Business Machs. Corp., 737 F. Supp. 1420, 1427 (E.D. Pa. 1990) (same).

3. Negligent Supervision Claim Against Defendant Pepsi

This tort claim is also excluded by the Worker's Compensation Act, 77 Pa. Stat. Ann. § 481(a), and the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 962(b) (West 1991 & Supp. 1996).⁸ Murray v. Commercial Union Ins. Co., 782 F.2d 432, 437 (3d

7. The claim for intentional infliction of emotional distress is also premised on defendants' breach of a pre-existing duty of care arising out of either the employment contract or the employer-employee fiduciary relationship. Amended Compl. II ¶ 54. However, those relationships do not create a heightened duty of care that would be the basis for a claim of intentional infliction of emotional distress. See Bradsaw v. General Motors Corp., 805 F.2d 110, 115 (3d Cir. 1986) (employer-employee status is not a special relationship similar to landlord-tenant or parent-child justifying relaxation of standard for extreme and outrageous conduct).

8. 43 Pa. Stat. Ann. § 962(b) provides that bringing an action under the PHRA "shall exclude any other action, civil or criminal, based on the same grievance of the complaint concerned."

Cir. 1986) (PHRA precludes tort claims premised on discrimination that may be remedied under the Act); Keck v. Commercial Union Ins. Co., 758 F. Supp. 1034, 1039 (M.D. Pa. 1991) (common law claim is preempted by PHRA unless factually independent of discrimination claim).

4. Title VII and PHRA Claims vs. Defendant Frankenberg

Individual employees are not suable under Title VII. Sheridan v. E.I. Dupont de Nemours and Co., 100 F.3d 1061, 1077 (3d Cir. 1996). Similarly, under the employment discrimination provision of the PHRA, 43 Pa. Stat. Ann. § 955(a), liability does not extend to employees. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Harper v. Robert J. Casey, Jr. & Assoc., Civ.A. 95-7704, 1996 WL 363913, at * 3 (E.D. Pa. June 29, 1996).⁹ Although an employee may be liable for aiding and abetting an employer in discriminatory practices under 43 Pa. Stat. Ann. § 955(e) or for retaliatory discrimination under § 955(d), the specific facts alleged here do not support such claims. See Dici, 91 F.3d at 552-53 (individual liability under § 955(e)); Wein v. Sun Co. Inc., 936 F. Supp. 282, 283 (E.D. Pa. 1996) (individual liability under §955(d)).

9. The PHRA claim is a matter of state law, governed by the rulings of the Pennsylvania Supreme Court, or if none exist, by the prediction of how that Court would decide the issue. Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992).

5. Consortium Claims

A spouse's loss of consortium is derivative of the other spouse's substantive claim. Murray, 782 F.2d at 438 (citing Little v. Jarvis, 219 Pa. Super. 156, 280 A.2d 617, 620 (1971)). Additionally, no authority exists for loss of consortium based on a civil rights violation. Quitmeyer v. S. E. Pennsylvania Transp. Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1124 (W.D.N.Y. 1996).

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AND NOW, this 28th day of May, 1997, on threshold motion of defendants Pepsi Cola Bottling Company and Brett Frankenberg, the state claims of intentional and negligent infliction of emotional distress, negligent supervision, and loss of consortium are dismissed. Fed. R. Civ. P. 12(b)(6). The PHRA claim, 43 Pa. Stat. Ann. § 955(a), against defendant Frankenberg is dismissed without prejudice to the filing of an amended claim by June 16, 1997 consistent with this memorandum and with Fed. R. Civ. P. 11.

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